

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : 13-CR-607

-against- US District Court  
Central Islip, NY

PHILLIP KENNER and  
TOMMY CONSTANTINE, June 6, 2014  
11 am

Defendants.:  
- - - - - X

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

LORETTA E. LYNCH  
United States Attorney  
271 Cadman Plaza East  
Brooklyn, New York 11201  
By: JAMES MISKIEWICZ, ESQ.  
CARRIE CAPWELL, ESQ.  
Assistant US Attorneys

For the Defense:

RICHARD D. HALEY, ESQ.  
For Defendant Kenner  
  
JOSEPH CONWAY, ESQ.  
For Defendant Constantine

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Transcript produced by CAT.

1 (Call to Order of the Court. Appearances noted  
2 as indicated above.)

3 THE COURT: Good morning.

4 As you know, we had set this down for a status  
5 conference, so I'll hear from the attorneys, starting with  
6 the government. Miss Capwell.

7 MS. CAPWELL: Yes, your Honor.

8 Since our last appearance, at the end of April,  
9 we have continued to provide discovery to defense counsel.  
10 We sent them a letter in May and then today I provided  
11 counsel with another three DVDs of material. So our  
12 ongoing discovery continues in this case.

13 I believe that defense counsel would like a date  
14 in early September, which the government does not object  
15 to. And I will let defense counsel address why they want  
16 that date.

17 Your courtroom deputy has suggested September 2,  
18 at 1:30, which is agreeable to the parties if it is  
19 agreeable to your Honor.

20 And in terms of Mr. Constantine's bond, I can  
21 let Mr. Conway address that, but there are still a few  
22 documents that are remaining to be turned over to the  
23 government.

24 THE COURT: How much discovery is left to be  
25 turned over, in terms of the percentage?

1 MS. CAPWELL: I would say about 15 percent  
2 probably.

3 THE COURT: Fifty? Five-zero?

4 MS. CAPWELL: Fifteen.

5 And the privilege review is still ongoing. And  
6 so that is discovery that Mr. Kenner already has. It is  
7 the electronic data that came out of Mr. Kenner's house  
8 computer pursuant to the search warrant that was executed.

9 But it has not been turned over to  
10 Mr. Constantine yet. It needs to be reviewed and  
11 sanitized before it can be turned over to Mr. Constantine.

12 So that, your Honor, it may take until the  
13 September 2 date for the AUSA to go through those  
14 materials.

15 THE COURT: Thank you.

16 Mr. Haley.

17 MR. HALEY: Yes, your Honor.

18 I would prefer, for purposes of the record, that  
19 there has been a continuous, if not incessant, provision  
20 of Rule 16 discovery by the government. And it is  
21 appreciated. I mention that to the court.

22 This is my third appearance in the case since I  
23 was substituted as counsel. Since my last appearance up  
24 until today, I have had additional opportunity to meet  
25 with my client, additional opportunity to begin to absorb

1 the significant amount of Rule 16 material provided in  
2 this case. And previously, your Honor, on the record I  
3 did not concede, as my earlier entry into the case, that  
4 it was necessarily a complex case.

5 I'm at this point going to concede, for speedy  
6 trial purposes, that it is a complex case. And I do so  
7 because I believe it is clearly in my client's interests  
8 to be able to fully absorb and understand the Rule 16  
9 material in order to be fully prepared for trial.

10 So I withdraw that previous opposition to this  
11 court's determination that this is a complex case for  
12 speedy trial purposes. Judge, having said that, I just  
13 want to mention, to alert the courts to some issues I hope  
14 can get resolved without court intervention.

15 The warden of the Queens Private Correctional  
16 Facility has been exceedingly cooperative. As your Honor  
17 may recall, two terabytes of information were delivered to  
18 me by the government for transmittal to my client. There  
19 was some issue as to the information contained on those  
20 terabytes because they weren't, the information was not  
21 exclusively related to this case. I was able to resolve  
22 that with the government.

23 The reason it wasn't exclusively related to this  
24 case, Judge, is that two terabytes consist of the hard  
25 drive reproduction from my client's Macbook Pro computer.

1 And that is a computer that was utilized in large measure  
2 by my client for over a decade. And it has information  
3 directly relevant to this case, directly relevant in terms  
4 of what the government claims is information for purposes  
5 of the prosecution, and I might add, judge, directly  
6 relevant to what we perceive is information relative to  
7 the defense in this matter. So that information is still  
8 being absorbed by myself and my client.

9 Your Honor, two issues have arisen, and I'm  
10 hoping to resolve these perhaps by way of speaking with  
11 the CJA representative in Brooklyn but I just want to alert  
12 the court at this point so the court might give it some  
13 thought. Maybe the court has a solution. But let me get  
14 specifically to the point.

15 As relates to the information provided in  
16 discovery, as distinct from the information on the  
17 terabyte hard drives, I will get to that in a moment, we  
18 do have information given to us on disks. Fortunately,  
19 the disk information which contains the imaging we are  
20 able to access. So that is not a problem. That  
21 information, in and of itself, is quite voluminous.

22 There are, by way of that type of discovery,  
23 judge, videotapes. And these are videotape depositions of  
24 persons that we believe will be government witnesses in  
25 this case. In those videotaped depositions, under oath

1 obviously, there is information that we believe is  
2 directly material and necessary to the defense of this  
3 action. The problem is my client cannot access that  
4 videotape information contained on those disks because the  
5 computer program in the IBM computer or PC-based computer  
6 at the Queens Private Correctional Facility does not have  
7 the appropriate software to open those videos.

8 I'm going to speak to the warden in that regard  
9 to see if I can resolve that. Hopefully that won't  
10 require any court intervention. The other issue, Judge,  
11 however, is more problematic.

12 The two terabytes, which once again are  
13 reproductions of the hard drives of my client's Macbook  
14 Pro computer, that information cannot be accessed on the  
15 Microsoft PC-based computers at the Queens Private  
16 Correctional Facility at all. The only way that  
17 information could be accessed is for it to be transferred  
18 from the terabyte hard drives into a Macbook Pro computer  
19 that has both the hardware and the software that would be  
20 readily able to translate that information into the  
21 computer for viewing analysis by my client as well as  
22 myself.

23 My client has taken the lead, your Honor, in  
24 identifying for me those materials which are materials  
25 necessary to the defense and those materials which are

1 not.

2 I bring this matter to the attention of the  
3 court. I'm going to contact Brooklyn to see if they have  
4 a solution. It may, however, Judge, result in an  
5 application to this court to allow me to purchase through  
6 use of CJA funds a Macbook Pro computer to be utilized by  
7 my client exclusively at the Queens Private Correctional  
8 Facility in order to access that information on these two  
9 terabytes.

10 If I obtain the Macbook computer, then I will  
11 deal with the institution as to whether they can set up a  
12 protocol by which he can use that computer exclusively.  
13 We do not want an instance where that computer at the  
14 Queens Private Correctional Facility can be accessed by  
15 other inmates, for obvious reasons. It pertains to  
16 information germane only to this case and it could result  
17 in spoliation of evidence that we believe necessary to the  
18 defense.

19 So we are going to have to deal with that issue,  
20 judge. I just mention it to your Honor to the extent that  
21 your Honor may or may not have had that in the past and  
22 has a suggestion.

23 THE COURT: I don't think I have encountered  
24 that precise issue. But I would ask you also to just  
25 discuss it with the government because, in addition to the

1 jail, there may be other cases where there is some type of  
2 accommodation made or solution to that type of problem.

3 I don't know, Miss Capwell, if you are aware of  
4 this coming up before in some other case.

5 MS. CAPWELL: I'm not, your Honor, but I will  
6 speak with other people in our IT department.

7 THE COURT: So speak to the jail. If they are  
8 not giving you an acceptable answer and if the government  
9 is not aware of some other option, then we will pursue the  
10 possibility of trying to get some other computer in the  
11 jail. Okay?

12 MR. HALEY: Thank you, your Honor.

13 The other issue, your Honor, deals with the  
14 adjournment being requested, your Honor, to September 2.

15 I anticipate in relatively short order I will be  
16 submitting to your Honor subpoenas for your Honor's  
17 review, and hopefully signature, pursuant to Rule 17B of  
18 the Federal Rules of Criminal Procedure. Since my client  
19 is indigent, there are a number of subpoena duces tecum  
20 that we are in the process of preparing, and I will,  
21 pursuant to the rules, be submitting those to your Honor  
22 along with a brief statement as to how we believe the  
23 information sought in these subpoenas is necessary to the  
24 defense.

25 I simply wanted to alert the court to that



1 prospect, indeed if not certainty, that there will come a  
2 time and I hope to be submitting those in relatively short  
3 order, certainly before the September 2 date, so your  
4 Honor might review them, see to it that they are provided  
5 to the marshals service for delivery, and then hopefully  
6 that material will be available by the next date of  
7 hearings set by this court.

8 THE COURT: Okay.

9 MR. HALEY: Thank you, your Honor.

10 I just want to give you an update as to where we  
11 stand from the defendant's perspective.

12 THE COURT: So your client is willing to exclude  
13 the time until September 2?

14 MR. HALEY: Yes, sir.

15 THE COURT: Thank you.

16 Mr. Conway.

17 MR. CONWAY: I don't have any substantive issues  
18 to raise. I acknowledge the government has been diligent  
19 in turning over production on the basis of discovery. We  
20 are now in receipt of a discovery letter today with three  
21 additional disks.

22 I'm coordinating with Mr. Haley in terms of any  
23 Rule 17 subpoenas that I have as well so they are not  
24 duplicative. We will have brought it to the court's  
25 attention as well.

1 I think the September 2 date is an appropriate  
2 date given the new discovery received today and the amount  
3 that we have received to date.

4 My client has signed a speedy trial waiver and  
5 is prepared to waive on the record.

6 THE COURT: Okay. Let me confirm that with  
7 them.

8 Mr. Kenner and Mr. Constantine, you have heard  
9 your attorneys. They want to adjourn the case until  
10 September 2 so that they can continue to review with you  
11 the massive amount of discovery that is being provided by  
12 the government and so that you can prepare your case and  
13 decide how you wish to proceed with respect to the case.

14 By signing a waiver, you are agreeing to exclude  
15 the time under the Speedy Trial Act until September 2 for  
16 those purposes.

17 Is that your wish, Mr. Kenner?

18 DEFENDANT KENNER: Yes, your Honor.

19 THE COURT: And is that your wish,  
20 Mr. Constantine?

21 DEFENDANT CONSTANTINE: Yes, your Honor.

22 THE COURT: So I will grant that application.

23 We will adjourn the case until September 2 at  
24 1:30. I exclude the time from today until September 2 on  
25 two grounds.

1 First, I had previously designated the case as  
2 a complex case, and all the reasons for that designation  
3 that I have already placed on the defendant record  
4 continue.

5 Independent of that designation, I exclude time  
6 in the interests of justice under Title 18, United States  
7 Code, Section 3161H7A, in order to allow the defendants  
8 and their counsel to review the discovery and prepare the  
9 case. I find that the interests served by granting the  
10 continuance outweigh the best interests of both the public  
11 and the defendants in a speedier trial and I so order the  
12 waiver.

13 It is my hope at the next conference that we can  
14 try to set a motion schedule and a trial date. I know you  
15 still have a lot of work ahead of you and that both  
16 counsel have been in the case from the beginning but I am  
17 giving you 90 days.

18 Hopefully the government will have all the  
19 discovery turned over by that date. But even if there is  
20 a little bit left to go, I still think it would be prudent  
21 to try to set a trial date for some time even if it is  
22 early next year. I don't have a trial date in place so we  
23 can have a time blocked out for trial so you can block out  
24 your time and be ready to go.

25 MR. CONWAY: Your Honor, I have one last topic,

1 if I could just raise it quickly, and it relates only to  
2 Mr. Constantine and his bail status.

3 It has been interesting dealing with several  
4 jurisdictions outside of the State of New York and how  
5 different procedures are outside of the State of New York.  
6 We are almost there. All six of the suretors have signed  
7 the bond. I think number six is actually signing it as we  
8 speak. There are still a couple of things that need to be  
9 done. It is hoped that it could be done as early as  
10 Monday or Tuesday of next week.

11 What I would ask the court is, if you can put  
12 this on for Thursday with the ability of moving it up to  
13 Wednesday or Tuesday if we are done by Monday, and I can  
14 coordinate with chambers. Because I think the easiest  
15 thing, once everything is done and the government is  
16 satisfied, is to release Mr. Constantine from here, he can  
17 be taken to the airport, put on a plane, and then report  
18 to pretrial within 24 hours.

19 THE COURT: Fine. He also has to sign the bond,  
20 itself.

21 MR. CONWAY: Correct.

22 THE COURT: So just talk to my deputy. I will  
23 be around all next week.

24 MR. CONWAY: Thank you, your Honor.

25 THE COURT: Anything else?

1 MS. CAPWELL: No. Thank you, your Honor.  
2 THE COURT: Anything else from the defense?  
3 MR. HALEY: No, your Honor.  
4 THE COURT: Anything else, Mr. Conway?  
5 MR. CONWAY: No. Thank you.  
6 THE COURT: Have a good day.  
7 (Proceedings adjourned at 11:10 am.)  
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9 CERTIFICATE OF COURT REPORTER

10 I certify that the foregoing is a correct transcript from  
11 the record of proceedings in the above-entitled matter.  
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Dominick M. Tursi, CM, CSR  
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